

Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 35 OF 1988

ABDUL HAMID LP, MOHAMED AZMI AND GUNN CHIT TUAN SCJJ

9 MARCH AND 8 APRIL 1989

Contract – Assignment of chose in action – Whether assignment absolute assignment or by way of charge only – Loan of money on security of assignment of right in property in respect of a sale and purchase agreement – Absolute assignment – Civil Law Act 1956, s 4(3)

Words and Phrases – ‘By way of charge only’

In this case the respondent, a licensed bank, entered into an agreement with the appellant, an incorporated company, whereby the respondent granted a loan of \$1m to the appellant repayable with interest at the rate of 13.5% pa or such rate as the respondent may specify from time to time, in accordance with the terms and conditions specified in the agreement. It was also provided in the agreement that the appellant would remain in possession of a floor of a building in Penang as a contractual licensee only of the respondent. It was also provided that in the event of default in the payment of the instalment payments covenanted in the agreement the respondent was to be at liberty to demand immediate payment of the balance and in the event of any part of the same remaining unpaid after 14 days from the date of such demand, the respondent would have the right to terminate the licence of the appellant by notice in writing and to enter upon the property and to deal with it as owner thereof in all aspects as the person absolutely and beneficially entitled thereto, including the right and power to sell or to transfer the property at such price and in such manner as the respondent deems fit free from any interest of the appellant. By way of security for the loan the appellant also executed a deed of assignment whereby it assigned absolutely to the respondent all its right, title and interest in the said property and in respect of a sale agreement whereby the appellant had bought the property from a company in Penang. The appellant defaulted in making payments under the said agreement. The respondent, after issuing notices of demand and notices to the appellant, commenced proceedings in the High Court in Penang seeking a declaration of sum due and owing by the appellant under the agreement and also orders that the appellant do quit and deliver up possession of the property within seven days of the service of the court order and that the respondent be at liberty to sell the property by public auction or private treaty. The learned trial judge gave judgment for the respondent (see [1988] 2 MLJ 62). The appellant appealed.

Held, dismissing the appeal:

(1) The deed in this case was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The deed clearly purports and is intended in point of form to be an absolute assignment because of the use of the words ‘absolutely’.

(2) The intention of the parties clearly was that the deed should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given by way of charge is not one which absolutely transfers the property.

A Cases referred to

- 1 *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 (folld)
- 2 *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (distd)
- 3 *Mahadevan & Anor v Manilal Sons (M) Ltd* [1984] 1 MLJ 266 (refd)

B**Legislation referred to**

Civil Law Act 1956 s 4(3)

National Land Code 1965 s 257

Appeal from: Originating Summons No 31-91-86 (High Court, Penang)

C

KS Narayanan for the appellant.

Louis Van Buerle for the respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): This was another appeal involving the interpretation of a deed of assignment executed on 3 September 1983, between Hipparion (M) Sdn Bhd (the defendant) as assignor of the one part and Chung Khiaw Bank Ltd (the plaintiff) as assignee of the other part.

- Briefly the material facts, which are not in dispute, are that on 3 September 1983, the plaintiff, a licensed bank, entered into an agreement with the defendant, an incorporated company, whereby the plaintiff granted a loan of \$1m to the defendant repayable with interest thereon at the rate of 13.5% pa or at such rate as the plaintiff may specify, from time to time, in accordance with the terms and conditions specified in the said agreement. It was also provided in the said agreement that the defendant would remain in possession of a property known as the third floor of a building standing on holding 355, town subdivision 14, north-east district, Penang, as a contractual licensee only of the plaintiff. It was further provided in the said agreement that in the event of default being made by the defendant in the payment of any one or more of the instalment payments covenanted to be made in the manner provided, the plaintiff was to be at liberty to demand immediate payment of the balance and in the event of any part of the same remaining unpaid after 14 days from the date of such demand, the plaintiff would have the right to terminate the licence of the defendant by notice in writing and to enter upon the property and to deal with all its right, title and interest as owner thereof in all respects as the person absolutely and beneficially entitled thereto, including the right and power to sell or to transfer such right, title and interest at such price and in such manner and subject to such conditions as the plaintiff shall in its absolute discretion deem fit free from any interest of the defendant.

By way of security for the loan the defendant also executed the said deed of assignment dated 3 September

1983 whereby it assigned absolutely to the plaintiff all its right, title and interest in the said property and in respect of a sale and purchase agreement dated 13 April 1981 whereby the defendant had bought the same property from a company called Penang Garden Sdn Bhd.

The defendant defaulted in making payments due under the said agreement and the plaintiff through its solicitors caused to be issued a notice in writing on 14 August 1985 demanding repayment of the loan together with accrued interest thereon within 14 days from the date of the demand. The plaintiff also caused to be issued another notice in writing on 30 August 1985 stating that if its demand for payment aforesaid was not complied with, it would proceed with the sale of the said property by advertising in the local press without further reference to the defendant.

On 30 January 1986, the plaintiff commenced proceedings by way of originating summons in the High Court at Penang seeking a declaration that the sum due and owing by the defendant under the said agreement as at 31 July 1985, is \$1,072,013.17, for principal and interest and further interest continues to accrue thereon at the rate of 14% pa from 1 August 1985, is also due till the date of payment. It also sought orders that the defendant do quit and deliver vacant possession of the property within seven days from the date of service of the court order and that the plaintiff may be at liberty to sell by public auction and/or private treaty the said property.

It was submitted by counsel for the defendant in the court below that the plaintiff was seeking to enforce a security for repayment of a loan and that the security documents concerned could be construed either as a security relating to land or a security relating to a chose in action. It was firstly contended that if the security documents were construed as a security relating to land, then the plaintiff's remedies would be restricted to orders of court under s 257 of the National Land Code and the sale, if there was to be one, would have to be by way of a judicial sale by public auction. But it was contended that as the documents were not in the form prescribed by the National Land Code the plaintiff's claim should be dismissed with costs.

It was, however, also submitted by way of alternative that at best the security interest created by the assignment and the said agreement was a security over a chose in action. But it was contended that the assignment purported to be by way of charge only as opposed to an absolute assignment and it was not open to the plaintiff to claim any beneficial interest in the said property.

Counsel for the plaintiff contended in the High Court that whether or not an assignment is absolute or by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956, should be gathered from within the four corners of the documents concerned. He cited and relied on the Federal Court case of *Nouvau Mont Dor (M)*

Sdn Bhd v Faber Development Sdn Bhd.¹ He further contended that if so construed, the assignment was absolute whereby all the defendant's rights, benefits and interest in the property had passed to the plaintiff, albeit by way of security. He also pointed out that the security in this case was a security relating to a chose in action, being an assignment of the defendant's rights, benefits and interest in the property under the said sale and purchase agreement of the property in respect of which strata titles have not yet been issued. As the security relates to a chose in action the provisions of the National Land Code could not apply and it followed that the relative rights of the defendant as an assignor and the plaintiff as assignee must be governed by contractual principles.

The learned judge had no hesitation in upholding the submissions of counsel for the plaintiff and, applying contractual principles, he concluded that the defendant's rights and benefits under the sale and purchase agreement had been assigned to the plaintiff under the assignment and that the defendant's right to possession after the assignment depended entirely upon the contractual licence granted to him by the plaintiff. As it was not in dispute that there had been default by the defendant in making payments specified in the agreement the plaintiff had lawfully exercised its right to terminate the licence and was entitled to enter upon the property and to deal with all the rights, title and interest in relation to it.

Mr Narayanan who appeared for the defendant in this appeal before us also referred to *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd*¹ and conceded that the assignment in this case was an assignment of a chose in action. But after referring to the Federal Court judgment in *Citibank NA v Ooi Boon Leong & Ors*² he submitted that the court in this case should also consider certain letters from the plaintiff to the defendant which, he stated, gave evidence of the factual background of the case. Then after referring to s 4(3) of the Civil Law Act 1956, he contended that the word 'charge' in the said section must mean an equitable charge. He then referred to the Federal Court case of *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd*³ in which it was, inter alia, held that there was no provision in the National Land Code prohibiting the creation of equitable charges or liens which are permissible under our land law. In that case, it was also held that the words 'other charge on land' in s 21(1) of the Limitation Act must be construed to include equitable charges or liens as well. Mr Narayanan therefore concluded that the assignment in this case was not absolute but was by way of charge only.

Mr Louis Van Buerle, who appeared for the plaintiff in the court below and before us, also referred to *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd*¹ and submitted that this was a case of absolute assignment. As the question of an equitable charge did not arise

in this case, he submitted that there was no need for the court to refer to *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd*.³

We would point out that in this case we are not concerned with a contract of guarantee as the Federal Court was in the *Citibank's* case but with a deed of assignment. We would therefore reiterate what this court has said in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd*¹ that 'whether or not an assignment is an absolute one (not purporting to be one by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself'. Now, whatever the parties might have as lay men stated in their correspondence between themselves, they had elected to have the assignment executed in the form of a legal document signed by both parties on 3 September 1983. After reciting (a) that the sale and purchase agreement dated 13 April 1981, made between Penang Garden Sdn Bhd of the one part and the defendant as the assignor on the other part, the former sold and the defendant purchased the said property. By that agreement the former also undertook to take all reasonable steps to obtain a subsidiary title to it; and (b) that the defendant has requested the plaintiff as assignee to grant it a loan of \$1m to enable it to complete the purchase of the said floor, the assignment was executed in the following terms:

In consideration of the assignee having agreed to grant the said loan the assignor as beneficial owner hereby assigns absolutely to the assignee all his right title and interest in and to the property and under the said agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.

Looking at the document we agreed with the conclusion of the learned judge that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The deed clearly purports, and is intended in point of form to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given 'by way of charge' is not one which absolutely transfers the property. As we have come to the conclusion that it was an absolute assignment we did not think it necessary to consider the contention of counsel that an equitable charge was made in this case. The appeal of the defendant was therefore dismissed with costs.

Appeal dismissed.

Solicitors: *Jayaraman, Ong & Co; Cheong Wai Meng & Van Buerle.*

Reported by *Prof Ahmad Ibrahim*

A **Muluk bin Ahmad & Anor v Public Prosecutor**

SUPREME COURT (KUALA LUMPUR) – CRIMINAL APPEAL
NO 37 OF 1986

LEE HUN HOE CJ (BORNEO), MOHAMED YUSOFF AND
AJAIB SINGH SCJJ

B 5 JANUARY AND 3 APRIL 1989

Criminal Procedure – Charge of murder – Cautioned statement – Trial within a trial – Right of defence to recall witnesses in respect of cautioned statement in a trial within a trial before a jury – Criminal Procedure Code (FMS Cap 6), 214(iii)

C In this case the two appellants had been charged with four offences of murder under s 302 of the Penal Code. They were found guilty and convicted on the alternative verdict under s 301 of the Penal Code and sentenced to ten years on each charge, the sentences to run concurrently. They appealed. On the appeal, the court decided to hear the parties on one main issue, that is, the right of the defence to recall witnesses in respect of a cautioned statement in a trial within a trial before the jury. The learned trial judge had rejected totally the application of the defence to recall witnesses in a trial within a trial before the jury.

Held, allowing the appeal:

(1) Following the case of *Yau Sun Fatt v PP*,³ a cautioned statement may sometimes be the mainstay of the case for the prosecution and the opportunity of the accused to repeat his allegations to the jury before the close of the prosecution's case is the proper and indeed the fairest way of enabling the jury, as sole judges of fact, to come to a fair decision as to its weight and value. This right is of particular significance in view of the power given by s 214(iii) of the Criminal Procedure Code to the jury to return a verdict of not guilty at the conclusion of the evidence for the prosecution.

(2) The failure to allow the accused to repeat his allegations in the presence of the jury has deprived him of a fair trial. A conviction so arrived at could not stand.

(3) The conviction and sentence is quashed and a retrial ordered.

G **Cases referred to**

- 1 *Yaacob v PP* [1966] 1 MLJ 67 (refd)
- 2 *Lee Kok Eng v PP* [1976] 1 MLJ 125 (refd)
- 3 *Yau Sun Fatt v PP* [1988] 1 MLJ 248 (folld)
- 4 *R v Francis & Murphy* (1959) 43 Cr App R 174 (refd)

Legislation referred to

H Criminal Procedure Code (FMS Cap 6) s 214(iii)

Appeal from: Temerloh Criminal Trial No 2 of 1985 (High Court, Temerloh)

TS Marbeck (Yusof Khan with him) for the appellants.
Abdul Hamid bin Mohamed (Deputy Public Prosecutor) for the respondent.

I

Cur Adv Vult

Lee Hun Hoe CJ (delivering the judgment of the court): We allowed the appeal, set aside the conviction and quashed the sentence. A retrial was ordered. We stated we would give our reasons later. We do so now.

The facts may be stated shortly. On 23 May 1984 at about 11.00 am, four deceased, namely, Chong Voon